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OCEANA, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

OCEANA, INC.,

Plaintiff,

v.

WILBUR ROSS, in his official
capacity as Secretary of the United
States Department of Commerce;
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION;
and NATIONAL MARINE
FISHERIES SERVICE,

Defendants.

Case No. 2:17-CV-05146

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. This action arises following the Secretary of Commerce's (the "Secretary")
3 improper withdrawal of a proposed regulation that would have established strict limits
4 on the bycatch of marine mammals and other species in the California drift gillnet
5 fishery for swordfish and thresher sharks. Specifically, Plaintiff Oceana, Inc.
6 ("Oceana") challenges the Secretary's June 12, 2017 withdrawal of a regulation
7 transmitted by the Pacific Management Council ("Council"), published in the Federal
8 Register as a proposed rule, and subjected to public comment.

PARTIES

9
10 2. Plaintiff, Oceana, Inc., is a non-profit international advocacy organization
11 dedicated to protecting and restoring the world's oceans through policy, advocacy,
12 science, law, and public education. Oceana has more than 600,000 members worldwide,
13 including 89,460 members in California. Oceana is organized under the laws of the
14 District of Columbia, and maintains its headquarters in Washington, DC. It has offices
15 or staff in eleven states, including Monterey, California. Oceana devotes considerable
16 resources to studying and communicating the ecological and economic importance of
17 sustainable fisheries management in the California Current Large Marine Ecosystem off
18 the U.S. West Coast. Curtailing the mortality of protected marine mammals and sea
19 turtles, such as those species that would have directly benefited from the regulation
20 withdrawn by the Secretary, is a central focus of Oceana's work.

21 3. Defendant, Wilbur Ross, is the Secretary of the United States Department
22 of Commerce. He is sued in his official capacity as chief officer of the federal
23 department charged by the United States Congress with managing the United States
24 marine fisheries.

25 4. Defendant, National Oceanic and Atmospheric Administration ("NOAA"),
26 is an agency of the United States Department of Commerce with supervisory
27 responsibility for the National Marine Fisheries Service. The Secretary of Commerce
28 has delegated responsibility for managing United States marine fisheries to NOAA,

1 which in turn has sub-delegated that responsibility to the National Marine Fisheries
2 Service.

3 5. Defendant, National Marine Fisheries Service (“Fisheries Service”), is an
4 agency of the United States Department of Commerce that has been delegated the
5 responsibility to manage United States marine fisheries through fishery management
6 plans, plan amendments, and regulations implementing those plans and plan
7 amendments. The Fisheries Service is the United States government agency with
8 primary responsibility for managing marine fisheries.

9 **JURISDICTION AND VENUE**

10 6. This Court has jurisdiction over this matter pursuant to the Administrative
11 Procedure Act, 5 U.S.C. § 706, which authorizes a court to “set aside agency action,
12 findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or
13 otherwise not in accordance with law [or] in excess of statutory jurisdiction . . .,” and 5
14 U.S.C. § 704, which provides a right to judicial review of all “final agency action for
15 which there is no other adequate remedy in a court.”

16 7. This Court also has jurisdiction over this matter pursuant to the Magnuson-
17 Stevens Fishery Conservation and Management Act (“The Magnuson–Stevens Act”), 16
18 U.S.C. § 1861(d), which provides that “[t]he district courts of the United States shall
19 have exclusive jurisdiction over any case or controversy arising under [the Magnuson-
20 Stevens Act].”

21 8. This Court also has jurisdiction over this matter pursuant to 28 U.S.C. §
22 1331, which grants the district courts “original jurisdiction of all civil actions arising
23 under . . . laws . . . of the United States” and 28 U.S.C. § 1361, which grants the district
24 courts “original jurisdiction of any action in the nature of mandamus to compel an
25 officer or employee of the United States or any agency thereof to perform a duty owed
26 to the plaintiff.”

27 9. Venue is proper in this district court pursuant to 28 U.S.C. § 1391(e).

1 10. The Court may issue a declaratory judgment in this case pursuant to 28
2 U.S.C. §§ 2201-02, and may grant relief pursuant to the Magnuson-Stevens Act, 16
3 U.S.C. §§ 1861(d) and 1855(f), and the Administrative Procedure Act, 5 U.S.C. § 706.

4 **LEGAL BACKGROUND**

5 11. The Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1884, establishes the
6 primary regime for managing fisheries in U.S. federal waters. The Magnuson-Stevens
7 Act creates a unique system whereby individual councils made up of fishery
8 constituents develop fishery management plans, amendments, and implementing
9 regulations for fisheries within their geographic purview.

10 12. The Magnuson-Stevens Act provides, *inter alia*, for a streamlined process
11 for the approval of regulations implementing fishery management plans.

12 13. The streamlined regulatory approval process emphasizes the individual
13 decision-making authority of the fishery management councils and limits the actions the
14 Secretary may take in response to council decisions.

15 14. Specifically, upon transmittal of a proposed regulation to the Secretary, the
16 Secretary must determine whether the proposed regulation is “consistent with the
17 fishery management plan, plan amendment, [the other provisions of the Magnuson-
18 Stevens Act], and other applicable law.” 16 U.S.C. § 1854(b)(1).

19 15. If the determination is negative, the Secretary is limited to notifying the
20 proposing council of identified “inconsistencies and provide recommendations on
21 revisions that would make the proposed regulation[] consistent.” 16 U.S.C. §
22 1854(b)(1)(B).

23 16. If the determination is positive, the Secretary must publish the proposed
24 regulation in the Federal Register for comment. 16 U.S.C. § 1854(b)(1)(A).

25 17. Within thirty (30) days of the conclusion of the comment period, the
26 Secretary must promulgate the final regulation and must “consult with the [proposing
27 council] before making any revisions to the proposed regulation[], and must publish in
28

1 the Federal Register an explanation of any differences between the proposed and final
2 regulation[.]” 16 U.S.C. § 1854(b)(3).

3 **PROCEDURAL AND FACTUAL BACKGROUND**

4 18. The California Current is a migratory destination for large numbers of
5 animals that come to feed in these rich productive waters, which include the waters off
6 the coast of California.

7 19. The primary ports for the California-based drift gillnet swordfish fishery
8 are located in the Santa Barbara, Los Angeles, and San Diego areas.

9 20. There are fewer than 80 existing permits for the California-based drift
10 gillnet swordfish fishery.

11 21. Of those vessels permitted to fish, approximately 20 are active in the
12 fishery.

13 22. In pursuit of swordfish, the California-based drift gillnet fishery uses mile-
14 long nets that are set nearly 200 feet deep at night.

15 23. These drift gillnets are inherently unselective and have a long track record
16 of catching, *inter alia*, whales and sea turtles.

17 24. Between 2004 and 2017, the drift gillnet swordfish fishery discarded 61%
18 of all animals caught.

19 25. Between 2001 and 2015, the fishery caught 754 dolphins, 507 seals and sea
20 lions, 112 seabirds, 53 whales, and 35 sea turtles.

21 26. In March 2012, to mitigate bycatch impacts, the Council requested that the
22 Fisheries Service determine the next steps for establishing hard caps for sea turtles in
23 the drift gillnet fishery.

24 27. In 2014, the Council took action to develop a comprehensive plan to
25 transition the drift gillnet fishery to a fishery utilizing more environmentally and
26 economically sustainable gear types.

27 28. In or about September 2014, the Council adopted ranges of alternatives for
28 high priority protected species hard caps, finfish bycatch caps, and enhanced monitoring

1 for the drift gillnet fishery. The Council identified a preliminary preferred alternative
2 that included annual hard caps for fin, humpback and sperm whales, leatherback,
3 loggerhead, olive ridley, green sea turtles, and short-finned pilot whales.

4 29. In or about November 2014, the Council expressed its polity intent to
5 pursue management measures designed to improve the target performance of the fishery,
6 while encouraging alternative gears.

7 30. In or about June 2015, the Council adopted additional alternatives and
8 directed the Highly Migratory Species Management Team to analyze them for final
9 Council action in September 2015.

10 31. In or about September 2015, the Council took final action to adopt final
11 preferred alternatives for management of the drift gillnet fishery, including hard caps for
12 high priority protected species. The final preferred alternative included annual hard
13 caps for fin, humpback and sperm whales, leatherback, loggerhead, olive ridley, and
14 green sea turtles, short-finned pilot whales, and common bottlenose dolphin.

15 32. On or about September 23, 2016, the Council transmitted to the Secretary a
16 proposed regulation requiring hard caps on the bycatch of five marine mammal species
17 and four sea turtle species within the California-based drift gillnet fishery.

18 33. The regulation would have required the immediate closure of the fishery if
19 a hard cap were met or exceeded for any one of the nine protected species. The length
20 of such closure would have depended on when, during a rolling two-year period, the
21 hard cap was reached.

22 34. Strict bycatch limits, like those in the proposed regulation can benefit
23 protected species. Among the benefits from protections like these are the incentives to
24 change behavior in the fleet and to switch to clean fishing methods, such as deep-set
25 buoy or harpoon gear, which have minimal interactions with protected species. These
26 indirect benefits were identified by Oceana and others during the process that led to the
27 proposed regulation.
28

1 35. On or about October 13, 2016, the Secretary published the regulation in the
2 Federal Register for a public comment period. 81 Fed. Reg. 70,660.

3 36. In so doing, the Secretary determined that the proposed rule was consistent
4 with the fishery management plan, other provisions of the Magnuson-Stevens Act, and
5 other applicable law. *Id.*

6 37. Following the close of the public comment period on November 28, 2016,
7 the Secretary did not, within thirty (30) days, promulgate a final regulation. 81 Fed.
8 Reg. 84,546.

9 38. Rather, on or about June 12, 2017, the Secretary decided the proposed
10 regulation was not warranted and withdrew it. 82 Fed. Reg. 26,902.

11 39. The Secretary did not determine that the proposed regulation was
12 inconsistent with the fishery management plan, other provisions of the Magnuson-
13 Stevens Act, or other applicable law.

14 40. The agency's Regional Administrator's correspondence to the Chairman of
15 the Pacific Fishery Management Council claimed that drift gillnet participants would
16 experience "significant adverse economic effects" that were not previously identified
17 and that the proposed regulation would offer little new protection to marine mammals
18 and sea turtles.

19 41. The Secretary's withdrawal of the proposed regulation has caused
20 irreparable harm to Oceana and its members that will continue absent this Court's
21 intervention.

22 42. Specifically, Oceana's members use and enjoy the oceans for numerous
23 activities, including fishing, wildlife observation, scuba diving, snorkeling, boating,
24 swimming, beach walking, research, and study. Oceana's members value and depend
25 upon a healthy marine environment for these activities.

26 43. Oceana's members also consume seafood caught in the California Current
27 Ecosystem.

1 44. Oceana's members are concerned about and directly affected by
2 environmental injury caused by unsustainable fishing in the U.S. West Coast fisheries
3 resulting in the unnecessary killing and depletion of special marine animal populations.

4 45. Injuries to Oceana's members include injuries to their recreational and
5 commercial use of fish populations, as well their interest in healthy populations of
6 whales and sea turtles.

7 46. The above-described aesthetic, conservation, recreational, commercial,
8 scientific, educational, and other interests of Oceana and its members have been, are
9 being, and, unless the relief prayed for in this Complaint is granted, will continue to be
10 adversely affected and irreparably injured by the Secretary's improper withdrawal of the
11 proposed regulation.

12
13 **FIRST CLAIM FOR RELIEF**

14 **Violation of the Administrative Procedure Act (5 U.S.C. § 706)**

15 47. Oceana re-alleges, as if fully set forth herein, each and every allegation
16 contained in the preceding paragraphs.

17 48. The Administrative Procedure Act requires that the Secretary not take any
18 action, make any findings, or reach any conclusions that are, *inter alia*, "arbitrary,
19 capricious, an abuse of discretion or otherwise not in accordance with law"

20 49. The Secretary violated the Administrative Procedure Act when it withdrew
21 the Council's proposed regulation implementing hard caps on the bycatch of five marine
22 mammal species and four sea turtle species.

23
24 **SECOND CLAIM FOR RELIEF**

25 **Violation of the Administrative Procedure Act (5 U.S.C. § 706)**

26 50. Oceana re-alleges, as if fully set forth herein, each and every allegation
27 contained in the preceding paragraphs.

1 51. The Administrative Procedure Act requires that the Secretary not take any
2 action, make any findings, or reach any conclusions that are *inter alia*, “in excess of
3 statutory jurisdiction, authority, or limitations”

4 52. The Secretary violated the Administrative Procedure Act when it withdrew
5 the Council’s proposed regulation implementing hard caps on the bycatch of five marine
6 mammal species and four sea turtle species.

7
8 **THIRD CLAIM FOR RELIEF**

9 **Violation of the Magnuson-Stevens Act (16 U.S.C. § 1854)**

10 53. Plaintiff re-alleges, as if fully set forth herein, each and every allegation
11 contained in the preceding paragraphs.

12 54. The Magnuson-Stevens Act prescribes a process by which the Secretary
13 must promulgate regulations transmitted by fishery management councils.

14 55. The Secretary violated the Magnuson-Stevens Act when it withdrew the
15 Council’s proposed regulation implementing hard caps on the bycatch of five marine
16 mammal species and four sea turtle species.

17
18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff respectfully requests that the Court:

- 20 • Declare that Defendants have violated the Administrative Procedure Act
21 and/or the Magnuson-Stevens Act when they withdrew the Council’s
22 transmitted regulation;
- 23 • Order the Secretary to promulgate the Council’s transmitted regulation in
24 accordance with the Magnuson-Stevens Act or otherwise Order the
25 Secretary to act in conformance with the Magnuson-Stevens Act;
- 26 • Maintain jurisdiction over this action until Defendants are in compliance
27 with the Administrative Procedure Act, the Magnuson-Stevens Act, and all
28 Orders of this Court;

- Award Oceana its costs of litigation as well as reasonable attorney and/or expert witness fees; and/or
- Grant Plaintiff such further and additional relief as the Court may deem just and proper.

Dated: July 12, 2017

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